United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1905

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To be argued by
IRWIN KLEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

ROBERT BOLLELLA,

Appellant.

BRIEF FOR APPELLANT

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Statutes

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 § 2113

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

Constitutional Amendments

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

ISSUES

1. Did a fatal variance exist between the offense charged in Count 4 of the Indictment and the proof?

2. Was reversible error committed in failing to give limiting instructions as to hearsay evidence to the jury as to Count 4, but merely as to the conspiracy count 1?

3. Was the appellant deprived of due process of law and a fair trial by the post-indictment conferences with law enforcement officers, in the absence of counsel?

4. Was the appellant deprived of due process of law and a fair trial by reason of prosecutorial misconduct in disclosing to him an official written exculpatory report of one of such post-indictment conferences upon which the appellant relied and at the same time withholding and concealing from the appellant that a brother officer was waiting to repudiate the contents of such official report in rebuttal?

5. Was reversible error committed in admitting into evidence a statement of a government witness that he gave $5,000 of the proceeds of a subsequent bank robbery to the appellant prior to this appellant testifying.

STATEMENT OF THE CASE

On December 12, 1971, a branch of the Manufacturers Hanover Bank in Brooklyn was burglarized. Eight persons were indicted. The appellant was named in Counts 1 and 4 (10a, 13a). Count 1 charged him and all others with conspiracy to burglarize such bank (18 U.S.C. 371) (10a). Appellant was acquitted by a jury before District Judge, EDWARD NEAHER, in the Eastern District of New York. Count 4 charged him and Louis Montello (when became ill and was severed from the case) with jointly receiving, possessing and concealing monies knowing same to have been taken from a bank (18 U.S.C. 2113 c)). (13a) Appellant was found guilty of Count 4 and sentenced to a three (3) year term of imprisonment (383a).

Appellant appeals from such judgment of conviction (384a).

Appellant moved to vacate and set aside the jury verdict upon grounds similar to those urged herein (291a). Such motion was denied (350a).

Appellant is a New York City police officer who had been suspended pending the determination of this case.

The theory of the prosecution as to the offense alleged in Count 4 was that appellant was to receive a one-half share of the burglary loot (Louis Montello was to receive the other half thereof) (72a). Hence, he and Louis are charged with the joint receipt of one

$14,000.00 share ($7,000.00 to each) (13a, 72a). Count 4 also charges that they received such loot on or about December 14, 1971, a day or two after the burglary (13a)

The prosecutor so stated in his opening when he described the part of each defendant in the conspiracy (72a

The only proof of receipt of a half share was hearsay testimony of Denisch in the absence of the appellant while the others were dividing the stolen money (146a, 147a). The Court issued limiting instructions as to the conspiracy count but did not issue any limiting instructions as to Count 4, although requested (147Aa). No other proof was offered that appellant received any share of the loot.

The Court permitted Denisch, a government witness, to testify on its main case that four months after the Manufacturers Hanover burglary, he and others burglarized a Chase Manhattan Bank and sometime thereafter gave appellant $5,000.00 which he said, came from such subsequent burglary. This statement was received over objection and the Court refused to charge with respect thereto (150a, 151a, 152a, 157a, 158a).

After indictment and retention of counsel, the appellant was called to two meetings with law enforcement officers in the absence of his counsel. (90a, 109a, 127a, 128a, 129a, 130a, 213a). In both, pressure was brought to bear upon him to become a prosecution witness. The

prosecutor was aware of these meetings. An official written report of one of these meetings with two New York City policemen was made by one of these policemen (380a) which stated in effect that no results were obtained from such meeting (380a). The prosecutor furnished such report to appellant's counsel. Appellant, in reliance thereon, then took the stand and testified as to such incident to demonstrate a violation of his Massiah rights and introduced such report into evidence (252a). Low and behold -- in rebuttal, the prosecutor called the other police officers who testified that the appellant had admitted or confessed his participation but would not testify for the prosecution because of fear for his life (247a). However, prior thereto, the prosecutor indicated to the Court that no such evidence would be forthcoming (65a, 66a, 67a).

POINT I

A FATAL VARIANCE EXISTED BETWEEN THE INDICTMENT AND PROOF WHICH WAS MATERIAL AND PREJUDICIAL TO THE APPELLANT

Count 4 charged the appellant and LOUIS MONTELLO with joint receipt of one $14,000 share of burglary proceeds at LOUIS' home on December 14, 1971, immediately after the burglary of the Manufacturers Hanover Bank. There is a fatal variance present. Count 4 charged this appellant with the commission of the offense by acting in a specified capacity - his personal share of the loot in return for having allegedly introduced Condon and Denisch to the MONTELLOS (13a, 72a) However, the proof offered was that he allegedly acted in an entirely different capacity - as a future conduit for the shares of Condon and Denisch in which he had no personal interest or stake.

The date of December 14, 1971 refers to the events of the night of the burglary at Louis' home, immediately after the burglary. The only evidence pertaining to December 14, 1971 and the proceeds of the burglary took place at LOUIS MONTELLO'S home in the absence of this appellant and each one's share amounted to $14,000 and LOUIS and this appellant were supposed to have divided one of such $14,000 shares. Of course, such hearsay testimony was not binding upon this appellant.

Such hearsay testimony was introduced solely as part of the conspiracy count; of which this appellant was acquitted.

Absent such conspiracy count, such hearsay statement of Denisch is not admissible as to this appellant.

There was no other evidence in the case pertaining thereto.

As an afterthought, the government attempted to substitute proof of subsequent payments by this appellant to Condon and Denisch. This was not contemplated by the indictment. Moreover there is no proof that this appellant received or was in possession of, or concealed burglary proceeds, on or about December 14, 1971. Nor is there any proof of distribution of funds by LOUIS MONTELLO or that he and this appellant divided one $14,000 share.

Count 4 charges a specific offense but the proof establishes a different crime not included in that charged.

There is a material variance between Count 4 and the proof as to the manner, method and means by which the offense was allegedly committed, to wit - receipt of funds for personal gain at the time of the burglary as distinguished from subsequently acting as a conduit with no gain.

In any event the date of December 14, 1971 specified in Count 4, was an essential ingredient of the offense charged but was not proven as so specified.

United States v. Kissel, 218 U.S. 601. Clyatt v. U.S., 197 US 207, Berger v. U.S., 295 US 78.

The Court acknowledged that there was no proof of receipt of any of the burglary loot by this appellant.

The evidence upon which the government now relies is beyond the intent and scope of Count 4 which charged this appellant and LOUIS jointly with receipt of $14,000 of stolen loot on or about December 14, 1971.

The thrust of each charge was that this appellant was to receive a one-half share of the proceeds of such burglary and this appellant directed his defense thereto.

The prosecutor so stated in his opening to the jury (72a)

The naked payments subsequent to December 14, 1971 do not support an inference that this appellant actually received or concealed burglary loot.

The Trial Court left the issue of the date of termination of the conspiracy to the jury and the jury could have found that the conspiracy continued until full distribution of the burglary loot; but apparently the jury found that the conspiracy ended up on the night of the burglary and found this appellant not guilty of the conspiracy charge.

Such evidence of payments made as a conduit may not now be used to support a conviction under Count 4; particularly in view of this

appellant's acquittal of the conspiracy count. As the Court pointed out (92Aa) ~~(p. 602)~~ the indictment does not read $28,000; nor did the proof show $28,000; nor the date of December 14, 1971.

Any evidence which was introduced as part of the conspiracy to show that this appellant acted as a conduit in distributing shares of the burglary loot to two of the conspirators, is insufficient upon which to bottom the verdict of guilty as to Count 4.

None of the three elements necessary to sustain a conviction under Count 4, have been proven.

The thrust of such proof varies substantially with the particular offense charged in Count 4.

In Stirone v. United States, 361 U.S. 212, Mr. Justice Black, speaking for the United States Supreme Court, stated:

> "The crucial question here is whether he was convicted of an offense not charged in the indictment.
>
> * * *
>
> The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment.

Ever since Ex parte Bain, 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself.

* * *

The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also United States v. Norris, 281 U.S. 619, 622. Cf Clyatt v. United States, 197 U.S. 207, 219, 220. Yet the court did permit that in this case.

* * *

While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury.

Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare Berger v. United States, 295 U.S. 78. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge."

In the language of Jeffers v. U.S.A., 392 F2 749:

> "(1,2) While the government may very well have intended this latter fraudulent representation or scheme to defraud as the basis of the charges made in the indictment, the fact remains that it did not so charge. Neither this court nor the trial court is free 'to change the charging part of an indictment to suit its own motions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes.' Russell v. United States, 369 U.S. 749, 770, 82 S. Ct. 1038, 1050, 8 L.Ed 2d 240 (1962). Such variance is fatal in this case for while a conviction based on the theory now advanced by the government may be permissible, we cannot say from the record before us that such was the theory adopted by the petit jury or the grand jury, or that they adopted the same theory. Therefore, we reverse."

The Court issued limiting instructions that the testimony in Louis Montello's home was hearsay and not binding upon this appellant unless he became a member of the conspiracy. However, such limiting instructions pertained solely to the conspiracy charge. The Court did not instruct the jury that such hearsay testimony could not be utilized against this appellant under Count 4. The jury was aware that this appellant was charged with two counts, conspiracy (#1) and the substantive offense of receiving (#4). Inasmuch as such

limiting instructions were directed merely and solely to the conspiracy count, the jury was permitted to find and perhaps it was thereby suggested to them that such testimony could be considered applied and utilized against this appellant on the substantive count (#4).

The proof of passing off someone else's funds as a conduit is substantially and entirely different, distinct and separate from and at variance with the charge of receiving one's own share of the loot, and is not fairly embraced within such charge and the admission of such proof under Count 4 was prejudicial to this appellant.

As stated in Epstein v. U.S.A., 172 F2 734:

> "In the language of the indictment, there is no uncertainty of meaning. The scheme charged is, plainly, that the appellants entered into a scheme to defraud.
>
> * * *
>
> There was nothing constructive about this kind of fraud. It was a charge of actual, active, intentional fraud. It was a charge required to be proved against the defendants; and the government started out to prove it.
>
> * * *
>
> As stated, the government started out to prove the fraud charged against appellants - an actual, intentional fraud - and failed.
>
> * * *

"To agree with the government's contention and hold that the charge in the indictment is identical to the present accusation that, by virtue of

* * *

would be to ignore the plain meaning of plain language. A defendant in a criminal case is entitled to know what he is charged with; and he is entitled to be tried on the charges brought against him. Bratton v. United States, 10 Cir., 73 F 2d 795; United States v. Wills, 3 Cir., 36 F 2d 855.

* * *

The charge in the indictment was entirely different from the accusation of breach of trust through receipt of secret profits by a director. There was, therefore, a fatal variance between the allegations in the indictments and the proofs. Walker et al v. United States, 4 Cir., 104 F 2d 465; United States v. Byers, et al., 2 Cir., 45 F 2d 364; United States v. Wills, supra. On the motion of appellants, the trial court should have entered a judgment of acquittal on the ground of fatal variance; and its refusal to do so was error.

In fact, such proof of funneling of someone else's shares to them as a mere conduit is diametrically repugnant to and negates the specific charge of sharing in the loot as a recipient thereof; nor does the indictment refer to the same monies as proven; viz, this appellant's earmarked share or the monies paid to Denisch and Condon.

In U.S. v. Lippi, 193 F. Supp. 441, the Court stated:

> "(2) The United States further asserts Stirone v. United States, 1960, 361 U.S. 212, 80 S. Ct. 270, 4 L.Ed. 2d 252, is not pertinent to the case at bar. Nevertheless, the Court continues to find it relevant, particularly to the issue of surprise. In that case, the Court of Appeals, in affirming the conviction below, found 'counsel was prepared for the introduction of the testimony rather than surprised by it.' [3] United States v. Stirone, 3 Cir., 1958, 262 F. 2d 571, 574. Without altering this finding, the Supreme Court unanimously reversed and limited the government's proof to the specific charges contained in the indictment. Stirone v. United States, 1960, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252. Actual surprise, therefore, is not necessary to render a variance fatal. The issue is not whether counsel is in fact surprised but whether there is a substantial possibility, tested from the perspective of the presumption of innocence,[4] that counsel will be unprepared to meet proof inconsistent with charges contained in the indictment. Although this rule may seem unduly harsh, it can be justified on several grounds. First, actual surprise may be exceedingly difficult to prove. Second, the rule discourages indifference and carelessness in the exercise of the prosecutory function, a critical role in an accusatory system such as ours. Third,

as the Court remarked in Stirone, the very purpose of grand jury proceedings is to limit an accused's jeopardy to the offenses charged by his fellow citizens acting independently of the prosecutor and judge. 361 U.S. 212, 218, 280 S. Ct., 270.

Judged by this rule, the variance here is fatal. Proof on the issue of wilfulness or knowledge may be quite different when the charge involves payment of insurance premiums than when it concerns the direct transfer of currency. Counsel's investigation will also vary substantially depending upon which charge is made in the indictment.

(3) The government has further asserted defendant could have protected himself by requesting a bill of particulars. This Court is unwilling, however, to require criminal defendants to employ this device solely to be certain an indictment means what it says.

In Sulton v. U.S., 157 F2 661, the Court stated:

"(5) The Sixth Amendment of the federal constitution requires that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This means that he shall be so fully and clearly informed of the charge against him as not only to enable him to prepare his defense and not be taken by surprise at the trial, but also that the information as to the alleged offense shall be so definite and certain that he may be protected by a plea of former jeopardy against another prosecution for the same offense.[4]

(6,7) If the information in the instant case failed to meet either of these require-

ments, it contained a constitutional defect or omission that prejudicially affected the substantial rights of appellant.

As Chief Justice Marshall stated in the early case of Hoppet v. U.S., 7 Crouch 389 3 L.Ed 380:

> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced."

BOLLELLA has been convicted; but of what, no one can say with certainty. The only thing certain is that he was not convicted as charged, with being a recipient of a share of the loot.

As succinctly stated in Grimsley v. U.S., 50 F 2d 509:

> "...two substantial things must concur before a defendant may be convicted of a felony in a court of the United States;
> (1) He must be charged by indictment with the commission of a federal offense;
> (2) the offense must be proven against him.
>
> 'I have always supposed that as an indictment without proof cannot support a conviction, so proof, without indictment cannot.'"

In Gardella v. Chandler, 172 F 2d 919, the Court stated:

> "(2) Appellant also contends here, as he did upon his motion for acquittal made after verdict in the trial court, that the verdicts which purport to find him 'guilty of misbranding by introducing into interstate commerce a drug, to wit, Powdr-X with a label which was false and misleading' were fatally defective and insufficient to support a judgment of conviction or sentence against him because the information did not charge him with that offense and there was no substantial evidence that he committed it.
>
> * * *
>
> It is beyond argument that a man cannot, under the Fifth and Sixth Amendments, be convicted and sentenced for an offense not charged and not proven against him, and that is the situation in which this appellant stands upon the record before us. As succinctly stated by the Supreme Court a hundred and fifty years ago, 'A verdict is bad if it varies from the issue in a substantial matter,' Patterson v. United States, 2 Wheat, 221, 4 L.Ed. 224."

The prosecutor contended that this appellant was to receive a one-half share of the burglary loot in exchange for (a) introducing the two factions; and (b) distributing proceeds to Denisch and Condon. Such conduit payments were extinguished by the acquittal of the conspiracy charge.

To summarize:

a) There was a fatal variance between the indictment (Count 4) and the proof that he did not share in such proceeds, but instead acted as a conduit of the shares of Denisch and Condon. Such variance is substantial and prejudicial and in violation of this appellant's constitutional rights; and

b) The limiting instructions that the hearsay statement made in this appellant's absence (that LOUIS MONTELLO and BOLLELLA were to divide a $14,000.00 share of the proceeds of the Manufacturers Hanover burglary) could not be considered against this appellant on the conspiracy count (#1) were inadequate and prejudicial because they did not contain any limitation upon the consideration of such testimony under the substantive count (#4). This is supported by the fact that this appellant was acquitted of the conspiracy charge, to which limiting instructions were given but was convicted of the substantive count, to which no limiting instructions were given.

POINT II

THE POST-INDICTMENT CONFERENCE BETWEEN THE POLICE OFFICERS AND THIS APPELLANT, IN THE ABSENCE OF COUNSEL VIOLATED HIS RIGHTS UNDER MASSIAH V. U.S., 377 U.S. 201 THE BELATED REPUDIATION OF OFFICER ROSA'S WRITTEN REPORT OF SUCH CONFERENCE, BY OFFICER ROONEY, CONSTITUTED PROSECUTORIAL MISCONDUCT AND DEPRIVED THIS APPELLANT OF DUE PROCESS OF LAW AND UNFAIR TRIAL

It is the appellant's contention that such partial disclosure by the prosecution violated the appellant's Fifth Amendment right to due process of law and that the appellant was prejudiced thereby in that he was deprived of a fair trial. The appellant does not argue that the evidence suppressed by the prosecutor was "exculpatory" as such. Rather, by labelling Officer Rosa's report as exculpatory and furnishing it to the appellant, the prosecutor had a duty to make a full disclosure concerning the meeting which was the subject of the report. Pyle v. Kansas, 317 U.S. 213 (evidence favorable to the accused); Mooney v. Holohan, 294 U.S. 103 (deliberate presentation of evidence known to be false); Napue v. Illinois, 360 U.S. 264 (allowing unsolicited false testimony to go uncorrected); Brady v. Maryland, 373 U.S. 83 (suppression of material evidence favorable to the accused); Giglio v. U.S., 405 U.S. 150 (evidence affecting the credibility of witnesses). Requiring disclosure in such circumstances has as its purpose the avoidance of an unfair trial of the accused. Mooney v. Holohan, supra.

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly...." Brady v. Maryland, supra. [redacted].

In the light of Officer Rooney's version of the meeting, it is questionable whether the report so furnished was in fact "favorable" to the accused.

When the appellant introduced Officer Rosa's report the prosecution was thereby prepared to offer rebuttal evidence, and was aware of Officer Rooney's version (260a 261a 268a) and that Officer Rosa's report was either false or that knowledge of Officer Rooney's version would have been of high value in preparation of the appellant's defense.

Although a prosecutor may be and should be diligent in prosecuting a case, he must remain fair and impartial. He has a duty to refrain from improper methods calculated to produce a wrongful conviction. Vierecle v. U.S., 318 U.S. 236. In Mooney v. Holohan, supra. the Court condemned the presentation of evidence known to be false as a deliberate attempt to deceive the court and jury and as incompatible with the "rudimentary demands of justice." Even where the presentation of false evidence is not deliberate, the prosecutor has a duty not to allow false evidence to go uncorrected when it appears. Napue v. Illinois, supra.

Attempts to deceive the defendant in a criminal trial should be condemned. The prosecutor has a duty not to deceive the defendant. Deliberate misrepresentations (regarding the existence of admissions) by the prosecutor may deny a defendant of a fair opportunity to prepare for trial, and may constitute "such unfair, dishonest or ignoble conduct" as to deny the defendant due process of law. State v. Kahinu, 498 P. 2d 635, (1972, Hawaii). As noted in Brady, where exculpatory evidence is withheld, the prosecutor shapes the trial and is cast in the role of an architect of the proceedings. Brady v. Maryland, supra.

The report furnished by the prosecutor was used by the appellant in the preparation and presentation of his defense. He was mislead by the prosecutor into doing so by 1) the failure of the prosecutor to include the alleged admission in the response to the appellant's motion for production of statements and admissions and 2) by labeling the report of Officer Rosa as "exculpatory" when, in fact, he knew or had reason to believe that the report was false. Such an attempt to mislead an unwary defendant should not be condoned. Under the circumstances, the prosecutor had a duty to make full disclosure where partial disclosure was misleading. U.S. v. Smith, 480 F. 2d 664 (1973, 5th Cir.).

Had the government intended to use the admission allegedly made by the appellant in such post-indictment conference in its case in chief, the admissibility of the statement would have been challenged under Massiah v. U.S., 377 U.S. 201. No such opportunity to challenge admissibility was afforded to the appellant. Submission of that report as "exculpatory" led the appellant to conclude that Officer Rosa's version was the official version and to the tactical decision to testify in his own behalf as to such event. It would appear that in making such partial disclosure and withholding Rooney's contradictory version thereof, the prosecution had in mind and sought to benefit by the rule stated in Harris v. New York, 401 U.S. 222 (1971), that confessions, inadmissible in the government's case in chief for failure to comply with the requirements of Miranda v. Arizona, 384 U.S. 436, could be used for impeachment purposes.

Gamemanship has no place in the administration of criminal justice.

The impact of Officer Rooney's testimony on the jury cannot be questioned. Forewarned of the existence of such evidence, the defense counsel would not have relied upon Officer Rooney's report as the official version and would probably not have delved into the subject, even at the risk of waivering his Massiah rights.

Such prosecutorial misconduct placed him in the dilemma of either being impeached by Officer Rooney or forgoing the Massiah interrogations.

The failure of the prosecutor to make a full disclosure deprived the appellant of a fair opportunity to defend against the government's accusations, and this amounted to a deprevation of due process of law Chambers v. Mississippi, 410 U.S. 284.

The prosecutor, knowing that the report furnished the appellant conflicted with Officer Rooney's version of the meeting in question, should have submitted the problem of disclosure to the court to resolve any doubts, concerning the duty to disclose. Giles v. Maryland, 386 U.S. 16. In U.S. v. Meles, 462 F. 2d 918 (1972, 2d Cir.), The court held that the prosecutor should have submitted the problem to the court so that the balance of interest could be struck by one not involved in "the all too often competitive enterprise of prosecution."

The testimony complained of was highly prejudicial to the appellant. It was an attempt to capitalize upon an illegally obtained admission; an attempt to convict the appellant with his own words (if the admission was in fact made). There is more than a significant chance that absent that testimony a reasonable doubt could have existed in the minds of enough jurors to avoid a conviction. U.S. v. Pfingst, supra. The nature of the testimony was so critical that nondisclosure prevented the appellant from receiving a fair trial. U.S. v. Diaz-Rodriguez, 478 F. 2d 1005, (1973, 9th Cir., cert. dismissed 412 U.S. 964). The standard regarding

nondisclosure was stated in U.S. v. Kahn, 472 F. 2d 272 (2nd Cir.), cert. denied 411 U.S. 982 (1973).

> "If it can be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense. ...(citations omitted) The same rule applies, even in the absence of intentional suppression, if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention. ... (citations omitted) In each of these instances, the materiality of the evidence is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict. ...(citations omitted)."
> (at page 287).

This standard was cited with approval and applied in U.S. v. Pfingst, 490 F. 2d 262 (1973, 2d Cir.).

Significantly, the results of such post-indictment conference were conveyed to the Assistant United States Attorney.

Not only was the post-indictment contact with this appellant in the absence of counsel improper, but so was the withholding of Rooney's contradictory statement by the government, knowing that

counsel would rely upon the officer's negative report.

The appellant was convicted only after trial by ambush.

POINT III

THE TRIAL COURT ERRONEOUSLY PERMITTED DENISCH TO TESTIFY THAT HE GAVE $5,000.00 OF THE PROCEEDS OF A SUBSEQUENT BURGLARY OF THE CHASE MANHATTAN BANK (FOUR (4) MONTHS LATER) TO APPELLANT

The proof that this appellant received a share of the proceeds of a subsequent and different bank burglary was improperly submitted to the jury to show a criminal propensity on the part of this appellant to share in the proceeds of the earlier bank burglary, as well as his bad character (although not yet in issue); from which the jury could speculate that he would be just the type of person to share in the proceeds of the Manufacturers Hanover burglary and that he probably did so, all because of the erroneous showing that he did share in the proceeds of the other, subsequent burglary.

The jury was thereby erroneously permitted to speculate that it was the custom and pattern of this appellant to share in the proceeds of bank burglaries and thereby permitted him to be convicted of sharing in the prior Manufacturers Hanover loot by proof of having shared in the subsequent Chase Manhattan loot. The Court failed to

issue limiting instructions or to cover such error in its charge although requested to do so (157a, 158a)

Moreover, the Court refused to charge as requested with respect to such testimony (381a)

As illustrated in Point I, supra, the thrust of Count 4 was that this appellant allegedly received a half share of the burglary loot of the December burglary of the Manufacturers Hanover Bank. Denisch's statement that four months later he gave this appellant part of the loot of the burglary of the Chase Manhattan Bank was not only prejudicial but erroneously admitted.

The vice of such testimony is obvious. It tends to show a criminal propensity on the part of BOLLELLA to commit the type of crime charged in Count 4, to wit; sharing in the loot of bank burglaries. The jury was erroneously permitted to speculate that inasmuch as he had shared in the proceeds of the subsequent Chase Manhattan burglary, he probably also shared in the proceeds of the earlier Manufacturers Hanover burglary. Such speculation cannot be substituted for actual proof of receipt of a share of the Manufacturers Hanover burglary; of which there is none. Such testimony also amounted to a premature attack against BOLLELLA'S character. Intent was not at issue inasmuch as BOLLELLA denied any participation or receipt.

The prejudice to this appellant far outweighs the probative value, if any, of such testimony. Appropriate objections and motions were made (157a 158a 381a) but in any event, a case of clear error exists.

BOLLELLA was thereby deprived of a fair trial and denied due process under the Constitution.

In U.S. v. Vosper, 493 F. 2d 433 (1974, 5th Cir.) which involved a bank robbery, testimony was offered that on the day prior to the robbery in question, there was another robbery and Vosper was seen in the area, one block from the bank. The government argued that the similarity of the two occasions belied Vosper's assertion that he was an innocent bystander. The court held that although the observations of the day prior to the robbery did have some probative value, the evidence offered was not enough to connect Vosper in a meaningfull way with the prior robbery. Therefore, since the quantum of evidence of the prior crime was insufficient, the admission of testimony concerning the prior robbery was reversible error.

The case at bar is even stronger. The subsequent burglary was unrelated to the first; it occurred four (4) months later and there was no proof of all of the elements required by 18 U.S.C. 2113 c); viz, receiving, possessing, concealing - "Knowing the same to have been taken from a bank". There was no proof that this appellant knew the $5,000.00 was part of the burglarized loot.

By its very nature, evidence of unrelated crimes is highly prejudicial. Consequently, its admissibility is circumscribed by the requirement that there be substantial evidence that the defendant committed the other crime. Renzi v. State, 320 A.2d 711 (1974, Del.) The evidence required must be "plain, clear, and conlusive." Kraft v. U.S., 238 F.2d 794 (1956, 8th Cir.), U.S. v. Vosper, supra, U.S. v. Tomaiolo, supra.

Denisch's naked statement that he gave away $5,000.00 of his monies to this appellant is insufficient to charge this appellant with violation of Section 2113 with respect to the subsequent Chase Manhattan Bank.

Even though the evidence may be relevant, that does not necessarily make it admissible. Shepard v. U.S., supra. The only evidence of the subsequent offense was the statement of the government witness. Hence, there is a serious question whether the evidence of a collateral crime was plain, clear, and conclusive. Uncorroborated testimony by a government witness who admitted participating in several bank and other robberies is open to strong attack on the witness' credibility. The use of his testimony concerning the subsequent crime raises a question concerning the duty of the government to disclose the nature of the testimony. U.S. v. Baum, supra. When an allegation of another crime is made, this appellant should have been afforded an opportunity to prepare for the attack. To deprive him of this opportunity is to deprive him of a fair trial. The

admission of such testimony without requiring at least some corroboration to insure that the testimony offered was truthful and without affording the appellant with a meaningful opportunity to meet that evidence should be held reversible error.

It is an essential element of a fair trial that the jury only consider relevant and competent evidence bearing on the issue of guilt or innocence of the accused of the crime charged. Bruton v. U.S. 391 U.S. 123. Even relevant evidence may be inadmissible if its probative value is outweighed by the prejudice to the defendant and if the risk of confusing the jury is so great as to upset the balance of advantage and deprive the defendant of a fair trial. Shepard v. U.S. 290 U.S. 96.

As a general rule, evidence of uncharged crimes, wrongs, or alleged prejudicial acts are inadmissible.

The rule in the Second Circuit is that evidence of other crimes is admissible only if it is substantially relevant to some other purpose than merely to prove criminal character. U.S. v. Vario, 484 F.2d 1052 (1973 2d Cir., cert den. U.S.), U.S. v. Brettholz, 485 F.2d 483 (1973, 2d Cir.), U.S. v. Warren, 453 F 2d 738 (2d Cir.) cert. denied 406 U.S. 944 (1972). Other purposes include: The credibility of the defendant as a witness, U.S. v. Boutner, 478 F.2d 737 (1973, 2d Cir., cert. den. 414 U.S. 848); motive, opportunity, intent, knowledge, identity, or absence of mistake, U.S. v. Parker, supra; for the purpose

of proving a common plan, scheme, or design to commit the offense charged, Id. In U.S. v. DeCicco, 435 F. 2d 478 (1970, 2d Cir.) the Court stated that evidence of other crimes may only be introduced to prove knowledge, intent or design if knowledge, intent or design "is placed in issue in the case at trial." This is not the situation at bar. Even where such evidence is relevant, the defendant must have a fair opportunity to meet it.

In any event, the appellant's character was not yet in issue, inasmuch as Denisch made such statement during the main case of the prosecution and before the appellant testified.

CONCLUSION

In view of the fatal variance between the charges and the proof; the improper admission of hearsay evidence; the failure to give proper limiting instructions; prosecutorial misconduct in violating appellant's Massiah rights and spirit and intent of Brady v. Maryland; and the improper testimony as to receipt of a sum of money said to be part of the loot of an unrelated subsequent burglary; and the deprivation of due process of law and a fair trial, it is respectfully submitted that the judgment of conviction be reversed.

Respectfully submitted,

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